

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL)	
DIVERSITY, <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	Civil Action No. 18-112 (JEB)
)	
v.)	
)	
GINA RAIMONDO, <i>et al.</i> ,)	
)	
<i>Federal Defendants,</i> and)	
)	
MAINE LOBSTERMEN'S)	
ASSOCIATION, INC., <i>et al.</i> ,)	
)	
<i>Defendant-Intervenors.</i>)	
_____)	

[PROPOSED] ORDER ON REMEDY

Upon consideration of the relevant papers, evidence, and arguments, and for good cause shown, it is hereby ORDERED that Plaintiffs' Motion for Remedy is GRANTED.

It is hereby DECLARED, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, that:

1. NMFS's 2021 Biological Opinion violates the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Administrative Procedure Act (APA) because, in issuing an incidental take statement for lethal right whale take in the federal lobster fishery, NMFS failed to comply with section 101(a)(5)(E) of the MMPA, 16 U.S.C. § 1371(a)(5)(E), by authorizing incidental take under that statute prior to issuing an incidental take statement under the ESA, as required by section 7(b)(4)(C) of the ESA, 16 U.S.C. § 1536(b)(4)(C).

2. NMFS's 2021 Biological Opinion violates the ESA and the APA because, in issuing an incidental take statement for "zero" lethal right whale take, it anticipated, but did not lawfully authorize as required by section 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), the lethal incidental take of right whales in the federal lobster fishery.

3. NMFS's 2021 Final Rule amending the Atlantic Large Whale Take Reduction Plan, 86 Fed. Reg. 51,970 (Sept. 17, 2021), violates the MMPA and APA because it failed to include measures NMFS expected will reduce right whale mortality and serious injury in the U.S. lobster fishery to below the species' potential biological removal level within six months of the Final Rule's implementation, as required by section 118(f)(5)(A) of the MMPA, 16 U.S.C. § 1387(f)(5)(A).

It is hereby ORDERED that:

1. NMFS's 2021 Biological Opinion is VACATED as pertaining to the North Atlantic right whale and the federal lobster fishery and REMANDED to the agency, with vacatur stayed for six months from the date of this order, with instructions that any new biological opinion contain an incidental take statement that:

a) fully complies with the requirements of the MMPA, 16 U.S.C. § 1371(a)(5)(E), and ESA, 16 U.S.C. § 1536(b)(4)(C), in first authorizing incidental take under the MMPA prior to authorizing any anticipated lethal take of right whales in the federal lobster fishery; and

b) fully complies with the requirements of the ESA, 16 U.S.C. § 1536(b)(4), in appropriately authorizing any anticipated lethal take of right whales in the federal lobster fishery.

2. NMFS's 2021 Final Rule is REMANDED to the agency WITHOUT VACATUR with instructions that, within six months of the date of this order, NMFS shall issue a new rule to amend the Atlantic Large Whale Take Reduction Plan containing measures that the agency expects will reduce right whale mortality and serious injury in the U.S. lobster fishery to below the species' PBR within six months of implementing the new rule, as required by the MMPA, 16 U.S.C. § 1387(f)(5)(A).

SO ORDERED.

DATED: _____

HON. JAMES E. BOASBERG
United States District Judge